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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
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Our Ref –MISC82/11-15

19 November 2012

Dear Shane,

CIVIL SERVICE (SPECIAL ADVISERS) BILL

I attach, for the information of the Committee, comments by the Office of the Legislative Council on some drafting and technical issues in respect of the above Bill. The comments and any amendments which might flow from them do not affect the policy of the Bill.

Yours sincerely,

A handwritten signature in blue ink that reads "Norman". Below the signature is a long, horizontal, slightly curved line.

NORMAN IRWIN

Civil Service (Special Advisers) Bill

Some drafting and technical issues

1. This note deals only with drafting and associated technical issues. It does not deal with the general legal effectiveness of the Bill or with legislative competence. The points below vary in significance and some are, to some extent, matters of style or taste. But I note in particular drafting which does appear to accord with the norms of the NI statute book.

Clause 1

2. In the context of the Bill as a whole it seemed to me that clause 1 should contain a definition intended to operate for the purposes of the Bill only. But it is drafted as a proposition of law which would define “special adviser” in law generally. The definition is I think inaccurate (see para 4 below) - but in any event I would suggest that subsection (1) should begin with words such as “For the purposes of this Act” to indicate that section 1 is a definition and not a statement of law of general application.

3. Since the concept of a special adviser is already defined in law - by Article 3 of the Civil Service Commissioners (NI) Order 1999 - a more direct drafting approach might have been simply to refer to this existing law in defining “special adviser”. This would also have the benefit of automatically picking up any change to that definition (there has already been change to the definition since 1999). As matters stand, if the prerogative order is changed to alter the meaning of special adviser, a Bill will be needed to update any Act resulting from this Bill.

4. The definition of special adviser in the Bill appears to be wrong in law, in that it differs in two respects from the definition in the 1999 Order. Under the Bill a special adviser can be appointed by a junior Minister to advise the junior Minister. But the 1999 Order makes no provision for such appointments. Under Article 3(2)(b) read with Article 3(3) a special adviser may only be appointed by FM, dFM and any other member of the Executive Committee. A junior Minister is not a member of the Executive (NI Act section 20(1)) and so may not appoint a special adviser.

5. The second difference is that under the Bill a special adviser is someone who is appointed on terms providing that he ceases to hold office **on the date** the Minister ceases to hold office. But under the 1999 Order a special adviser is someone appointed for a period terminating **on or before the date** on which the Minister ceases to hold office. So a person serving on a short fixed term basis ending before the Minister ceases to hold office is a special adviser under the 1999 Order but arguably not under the Bill. This obviously opens up scope to evade the Bill by simply appointing special advisers on short term rolling contracts. The correction needed to correct this issue is to add the words “or before” in clause 1(4)

Clause 2

6. Subsection (2) provides for immediate termination of the appointment of a special adviser who “incurs a serious criminal conviction”. That language in itself is somewhat unconventional and I have been unable to find reference to the incurring of a conviction on the statute book.

7. Another issue on subsection (2) is what happens if the conviction is overturned on appeal? Immediate termination involves in a sense pre-empting the final outcome of the criminal process. If the person appeals immediately against conviction should the clause not allow the criminal process to run its full course before termination?

8. Subsection (3) does not work as drafted. It provides for the appointment of a special adviser holding office “on the coming into operation **of this section**” to be terminated immediately. The difficulty is that under clause 10(2) different parts of section 2 come into operation on different dates. The correction needed is to amend clause 2(3) to refer instead to the coming into operation **of this subsection**.

9. The drafting of subsection (4) is unconventional and ambiguous in that it is drafted in the plural and places obligations on “Ministers” to report appointments “by them”. Read literally this requires all Ministers to report all amendments made by any Ministers. The correction needed is to re-write the provision in the singular to require a Minister to report an appointment made by that Minister.

Clause 3

10. The list of convictions in clause 3(1) is defective in a number of respects.

- in subsection (1)(d) reference is made to detention “during the pleasure of the Secretary of State”; while this correctly covers sentences passed before the devolution of policing and justice it does not cover sentences after that event; the correction is to insert an additional reference to detention during the pleasure of the Minister of Justice;
- on similar lines subsection (1)(e) refers to a sentence of detention “during the pleasure of the Governor”; again while this correctly covers sentences passed before 1973, it does not cover sentences passed under section 73 of the 1968 Act after 1974; the correction is to insert an additional reference to detention during the pleasure of the Secretary of State.

11. Clause 3(2) repeats the mistake mentioned above by referring to “the coming into operation of this Act”. The Act comes into operation in three stages, thus rendering the reference ambiguous. The correction needed is to refer to “this section” instead of “this Act”.

12. Clause 3(2) also provides that the section applies whether the conviction was in Northern Ireland **or elsewhere**. But a conviction “elsewhere” cannot fall within subsection (1)(c), (d) or (e) as these are sentences known only to

the law of Northern Ireland. A possible solution is to refer to corresponding sentences under the law of other countries.

Clause 4

13. Subsection (1) refers to employment “during that year” which I take to mean employment during the whole year. Possibly what is intended is employment “**at any time** during that year”.

Clause 5

14. I understand this clause is intended to reflect the corresponding UK provision in section 8 of the Constitutional Reform Act 2010. If so, it seems odd that the drafting has been changed in a few minor respects but in ways which seem to render it defective:

- in subsection (2)(b) and (c) the corresponding UK provision refers to a special adviser not exercising certain “powers” whereas the NI version has been changed to “function”. As “function” includes “duty”, it seems rather odd to say that a special adviser must not fulfil a duty;
- the duties (functions) which the special adviser must not exercise are those “under any statutory provision”. If that includes the Bill itself, then the provision is completely self-contradictory since the adviser would not be able to exercise a function which consists of the duty to comply with the code of practice;
- the UK provision refers to Her Majesty’s prerogative whereas the NI Bill refers to “the prerogative” - is it clear what this means?

15. Subsection (5) has again been changed from its UK counterpart and refers to “the terms and conditions of **employment**” of special advisers. This is at odds with clause 1(4) which refers to them having terms and conditions of **appointment**. This latter wording seems preferable given the doubt about whether civil servants are “employed” in the traditional sense of employment under a contract of employment.

16. There seems to be a lack of co-ordination between the timings in this clause and those in clause 10. Under clause 10 the Bill is fully operation 2 months after Royal Assent. But clause 5 comes into operation on Royal Assent but allows 3 months for the Code to be made. So the Bill could be in operation without the Code being in place. Would it not be sensible to synchronise the timings?

Clause 6

17. The same point on timings arises as in clause 5.

18. What is the legal effect (if any) of the Code. Is an appointment in breach of the Code a valid one?

Clause 8

19. Very minor points but ideally

“**the** Department” in line 20;

“the Minister” in line 21;

delete line 24 - the reference to junior Minister is incorrect (see above);

Clause 10

20. The commencement provisions do not work properly. If clauses 5 and 6 are to come into operation at an early date then sections 8, 10 and 11 need to come into operation along with them.